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May 26, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 19, 2005

Case Number: TSO-0184

This Decision concerns the eligibility of xxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

The DOE issued a Notification Letter to the individual on December 10, 2004. That Notification Letter indicates the DOE has security concerns under criteria F and L, 10 C.F.R. § 710.8(f) and (l), which pertain to omissions and falsifications (Criterion F) and unreliability (Criterion L). There are two events which form the basis for the DOE security concerns. The first is the individual's September 2002 indictment for Medicaid fraud.<sup>1</sup> The second is the individual's failure to report his part time employment on his 1999 Questionnaire for National Security Position(QNSP).

1. The Indictment

On September 24, 2002, the individual was indicted by a federal grand jury for Medicaid fraud. Transcript of Hearing (hereinafter Tr.) at 22.<sup>2</sup> Fourteen employees and officers of a home personal

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<sup>1</sup> Originally there was a third factual basis for the security concern. However, the submission of an October 29, 2002 e-mail indicated that the individual provided timely information to the DOE about his indictment. Therefore, his alleged failure to provide information was withdrawn as a basis for the security concerns by the DOE hearing counsel. Tr. at 232, 319.

care company (hereinafter the “care company”) were named in the indictment. The indictment describes a scheme to bill Medicaid millions of dollars for services that were either unnecessary or not provided. September 24, 2002 Indictment at 7-11. Hereinafter DOE exhibit #2. The individual was indicted for submitting “fraudulent time reports, charting forms and other documents indicating that [he] had provided personal care service to a client of the [care company.]” DOE exhibit #2 at 9. The individual’s billing sheets indicated he provided home personal care service to his parents on “425 consecutive days” between October 1996 and December 1997. DOE exhibit #2 at 21. The indictment specifies that on 183 days during that period the individual was out of town on DOE work assignments and could not have provided those services. DOE exhibit #2 at 22 & Tr. at 163.

On May 20, 2004 the individual signed a plea agreement. DOE exhibit #9. In that plea agreement the individual pled guilty to submitting one false time sheet on December 5, 1997. DOE exhibit #1 at 4. The individual was sentenced on September 20, 2004 to two years probation, a \$2,500 fine, 40 hours of community service and restitution of \$10,000. Individual exhibit #4 at 4,5.

## 2. The 1999 QNSP

The individual completed a QNSP on December 10, 1999, which was filed with the DOE. The QNSP’s question 11 requests a list of “Your Employment Activities.” DOE exhibit #1 at 3. In this regard, the question describes the type of employment to be listed. It states “You should list all full-time, part-time, military service, temporary military duty over 90 days, self employment, other paid work, and all periods of unemployment.” The individual did not include in his answer to question 11 several of his part time jobs, including his part time employment with the care company .

## II. ENHANCE NATIONAL SECURITY

The individual manages the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Program. Tr. at 29. That program is part of the DOE xxxxxxxxxxxxxxxxxxxxxxxx program (hereinafter the “Program.”) The individual’s role in the Program is that of an action officer negotiating agreements and implementing the xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx (hereinafter the “Material”) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. Tr. at 33, 42. The Program has successfully processed a significant amount of Material. However, there is more Material which needs to be processed by the Program. Tr. at 33.

A. At the outset the individual asks me to consider the testimony of four co-workers, as well as documentary evidence which he believes demonstrates that granting him an access authorization will promote the Program and thereby enhance national security.

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<sup>2</sup> He learned about the indictment on October 7, 2002. He appeared in court on October 9, 2002. Tr. at 22.

### 1. The Individual's Supervisor

The individual's supervisor testified that she has known the individual since 2000 and she has been his supervisor since July 2003. Tr. at 34. She currently is aware of the basis for the DOE security concerns and has daily contact with the individual. Tr. at 30. She testified that the individual is very trustworthy. Tr. at 32. She indicated her strong belief that the Program enhances national security. Tr. at 84. She believes the individual is one of the most respected professionals working on the Program. Tr. at 34. She testified that the individual has extensive experience in foreign countries, technical knowledge about Material and strong dispute resolution skills. Tr. at 43. She believes that his skill mix was invaluable in successfully complete a number of the Program's projects. She believes the individual's future contributions to the Program will enhance the national security. Tr. at 36.

### 2. The Individual's Prior Supervisor

The individual's prior supervisor testified that she was the individual's supervisor for five years. Tr. at 50. She testified that during her career she has never worked with a person who was more reliable or loyal. Tr. at 53. She believes that if the individual's access authorization were not restored he could not be replaced and that the loss of his skill would jeopardize future successes of the Program. Tr. at 54, 69, 75. She believes that the Program is essential to the national security. Tr. at 64.

Individual's exhibit #9 is an August 2004 letter from the individual's prior supervisor to the laboratory division director whose testimony is summarized in section 4 below. The letter indicates that the previous supervisor believes the individual has made "critical and unique" contributions to the Program. Individual exhibit #9 at 1. The letter further indicates he has been the leading force in all levels of the Program.

### 3. Co-worker

The co-worker testified that she specializes in international law and national security and that she provides legal counsel to a number of international programs. She has known the individual for five years. Tr. at 81. She is aware of the basis for the DOE security concerns. She testified that the individual provides technical expertise and the ability to work productively with foreign nationals in sensitive negotiations. Tr. at 89. She believes that his combination of skills have made the Program a success. Tr. 90. She believes the individual is making a unique contribution to the national security of the United States. Tr. at 81, 84. She believes his access authorization should be restored. Tr. at 87.

### 4. Laboratory Program Director

The program director testified that he has known the individual since 1996. Tr. at 97. He indicated that the individual's access authorization is not only important to the people working on the Program but "to us that are concerned with our country." Tr. at 114. He testified that he has worked closely with the individual and believes he is capable and dedicated. He testified that the individual's "contributions to our country's security are significant and great." Tr. at 106. He is aware of the

basis for the security concerns. He believes that granting the individual an access authorization would enhance national security. Tr. at 112.

## 5. Documentary Evidence

Individual exhibit #7 is an April 2004 letter from the administrator of the NNSA. His letter indicates, in detail, that the individual has been essential to many of the successes of the Program. The letter also indicates that the Program has greatly improved the security of the nation. The letter specifically praised the individual for two specific projects and indicated that the individual has demonstrated a rare combination of “technical expertise, diplomatic acumen, professionalism and steadfast resolve.” Individual exhibit #7 at 1.

Individual exhibit #8 is a letter from the Assistant to the President for National Security Affairs indicating that the Program has made the United States and the world a safer place.

Individual’s exhibit #15 is a press release issued by a DOE laboratory the week before the hearing. The news release indicates that the individual has been critical member of the Program and that the Program has greatly improved the national security.

## B. Analysis of Enhance National Security Argument

I was convinced that the success of the Program will enhance national security. Each of the four witnesses called by the individual was a senior employee with the DOE or its contractor. Each was articulate, intelligent and dedicated to enhancing the national security. Each had detailed knowledge about the Program. Their testimony clearly demonstrates the important of the Program to national security. The letter from the head of NNSA and the letter from the Assistant to President for National Security Affairs support the testimony that the Program is essential to the national security. Clearly the success of the Program enhances the security of the United States and the world at large.

I was also convinced that the individual’s contribution is important to the success of the Program. The four witnesses and the letter from the Head of NNSA indicated the individual’s unique skills have been critical to the accomplishing several of the Program’s projects. He has facility with language, technical knowledge about the Material, and interpersonal skills that permit him to focus and structure negotiation to a successful conclusion. I am convinced that the witnesses genuinely believed that without the individual, the Program’s projects are less likely to be successful in the future. Therefore, I am persuaded that granting the individual an access authorization would enhance the national security. The individual’s attorney believes that this finding should lead me to conclude the individual’s access authorization should be restored.

I am not able to base a decision to restore an access authorization on this argument. Section 710.27(b) indicates in part “Possible impact of the loss of the individual’s access authorization upon the DOE program shall not be considered by the Hearing Officer.” 10 C.F.R. § 710.27(b). This principle has been affirmed in a number of previous cases. E.g. [Personnel Security Hearing](#) (Case No. VSO-0289), 27 DOE ¶ (November 18, 1999). See [Personnel Security Review](#) (Case No. VSA-0287), 27 DOE ¶ 83,024 (2000), [affirmed](#) (OSA June 5, 2000).

The purpose of that portion of §710.27(b) is quite clear. A hearing officer is responsible for considering the response of an individual to a security concern. Responses to security concerns typically deal with the charges underlying the alleged security concern or with information brought forward by the individual for the purpose of mitigating those concerns. Hearing officers are able to hear information regarding mitigation, weight the evidence and evaluate the support of the mitigating arguments. However, the regulations presume that hearing officers lack the expertise to determine the importance of a particular DOE program to the national security, the individual's contribution to that programs, the risks to national security if access authorization is withheld and the risks associated with granting an access authorization when a security concern has been shown.

The regulations prohibit hearing officers from considering the effect on the DOE mission in order to leave consideration of such arguments to the discretion of the office with expertise in these areas, the Office of Security. The Office of Security has the authority and knowledge to set conditions and limitations to minimize security risks. For example, the Office of Security has often set conditions for the continuation of an access authorization in cases where questionable behavior is an issue. We have seen the Office of Security grant access authorization to an individual who has used illegal drugs, based on the individual's written certification that he will not use illegal drugs in the future. The Office of Security has also granted access authorization to individuals with alcohol problems based on their agreement to complete a treatment program and regular testing. Further, the Office of Security may decide to continue an access authorization even when a concern exists, with the understanding that it will hold a Personnel Security Interview in six months or a year to review the matter. I have been informed that the Office of Security is aware of the individual's arguments and will give all facts presented by the individual appropriate weight. The individual's management may provide the Office of Security with additional information about this matter.

### III. MITIGATING TESTIMONY

The individual provided information which he believes mitigates the Criteria F and L security concerns.

#### 1. Contractor's Security Officer

The contractor's security officer indicated that he has known the individual since 1998. Tr. at 136. He conducted briefing and debriefing of the individual after his foreign travel. Tr. at 137. He testified there was never any indication that the individual was a threat to national security. Tr. at 137. He learned of the individual's indictment in September 2002. Tr. at 137. Several days after he learned of the indictment the individual sent him a copy of the indictment. Tr. at 140.

#### 2. The Individual

The individual testified that he came to the United States in 1991 and was granted political asylum. Tr. at 155. When he arrived in the United States he settled in a city in which he knew a man from his home town (hereinafter "home town acquaintance"). Tr. at 155. He stayed with the home town acquaintance and his wife for the first two months he was in the United States. Tr. at 258. Both the home town acquaintance and his wife were named in the September 2002 indictment.

His wife, two children and both parents came to the United States in 1995. All five received political asylum. Tr. at 158. His father had heart surgery in August 1995. Tr. at 244. While his father was recovering, the individual spent most of his time with his father in the hospital. Tr. at 159. During this period he read the care company's advertisement in a foreign language newspaper. Tr. at 160. He contacted the care company, which told him that since his parents each had a debilitating illness, Medicaid would pay him to provide personal care services<sup>3</sup> to his parents. Tr. at 161. Given his financial position he accepted employment with the care company. After two days of training he started providing home personal care services to his parents. Tr. at 161. He filled out forms weekly indicating the type of services and the time when those services were provided. Tr. at 162. He worked for the care company for 14 months from September 1996 through December 1997. Tr. at 162. During that period he was not aware that his home town acquaintances and his wife were also employed by the care company. Tr. at 234.

During the period in which he was employed by the care company, he provided home personal care services to his parents for 425 days. During that period he was also a part time employee of a DOE contractor. He was on DOE travel assignments for 183 days. Tr. at 167. During the 183 days he was on DOE travel assignments, his wife provided home personal care to his parents. Tr. at 168. The individual testified that he believed that since his wife provided the services, he was not violating the law in receiving payment for those services. Tr. at 170.

The individual resigned his part time position with the care company in December 1996 when he became a full time employee of the DOE contractor. At that time his wife became an employee of the care company. She worked for the care company for a year. Tr. at 222.<sup>4</sup>

The individual testified that he was interviewed by a postal inspector in January 2000. Tr. at 173. During the interview the individual provided general information about the care company and he told the inspector that his wife had substituted for him in providing services when he was unable to provide the services. Tr. at 172. He testified that he did not believe that he was being investigated for violating the law and believed that he was being interviewed to provide general information

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<sup>3</sup> Personal care service include household jobs such as cooking, cleaning, and shopping as well as helping patient to get out of bed, bathed and dressed. Personal care services do not require any medical training.

<sup>4</sup> The individual submitted a memorandum from him to the Director, Safeguard and Security Division, dated October 23, 2002. Individual's exhibit #11 and DOE exhibit #4. That memorandum provides his contemporaneous description of the facts surrounding his indictment. His testimony is consistent with the October 23, 2002 memorandum

about the care company. Tr. at 217, 221. He testified he was very surprised when he received the September 2002 indictment. Tr. at 172.

The individual testified that he received the indictment on October 7, 2002. Tr. at 174. He testified that the first thing he did was contact his attorney.<sup>5</sup> He appeared in court on October 9, 2002. Tr. at 174.

The individual testified that his attorney explained to him that submitting the forms indicating he provided the service when his wife actually provided the services is a violation of the law. Tr. at 170. Based on this information, the individual signed a plea agreement on May 20, 2004. Tr. at 198. That plea agreement is DOE exhibit #9. In the plea agreement the individual pled guilty to “knowingly and willingly preparing, signing, and submitting false documents that were used to obtain money.” Tr. at 198.

The individual testified that he did not report any part time jobs on his 1999 QNSP. Tr. at 207. He was asked why he did not report several part time jobs including the one with the care company. He replied that “Again, I don’t remember, honestly. Probably I asked and I was told just full-time jobs. I don’t remember.” Tr. at 208. It was then pointed out to the individual that he listed his part time employment at the DOE site. He was asked to explain why he included the DOE site and excluded the other part time employment. He testified “I’ve never considered [the site] as a part-time job.” Tr. at 214.

## 2. The Individual’s Mother

The individual’s mother testified that her son provided home care services to her husband and herself during the 1996 through 1997 period. Those services included shopping, cleaning, cooking and laundry. Tr. at 266. She indicated he would come early in the morning and then return later in the day. Tr. at 265. His mother testified that he came every day that he was in town. Tr. at 267. When the individual was out of town, his wife provided the care. Tr. at 267.

## 3. The Individual’s Friend

The individual’s friend testified that he has known the individual for five years. Tr. at 275. He sees the individual socially once every week or two. Tr. at 275. He testified that he believes the individual is honest and trustworthy. Tr. at 281.

## 4. Patient Representative

The patient representative testified that she was a medical doctor in her home country and currently is employed by a physician as a patient representative. Tr. at 283. She testified that she has known

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<sup>5</sup> He is the same attorney who is representing him in this proceeding.

the individual since 1996. Tr. at 284. She met the individual's parents through the individual and his parents later became patients of the doctor for whom she works. Tr. at 284. She testified that she is familiar with the medical history of the parents. The individual's father had bypass surgery and was disabled for a long time because of that surgery. Tr. at 284. She testified that the individual's mother has serious arthritis and a hip replacement. Tr. at 285.

The patient representative testified that she had heard about the care company but had never done any business with them. Although she did not have personal knowledge of the individual's care for his parents, she has worked with other patients who received home personal care services from other companies. Tr. at 285. She described the procedure for obtaining personal care service under Medicaid. First, a registered nurse visits the disabled patient and writes an evaluation and a recommendation as to whether the patient should receive home personal care services. If the primary care doctor also approves the recommendation, the patient is eligible for the home care under Medicaid. The home care agency then finds a home care worker to provide the services. Tr. at 286. After three months the nurse reevaluates the patient and makes another report to the primary care doctor. Tr. at 286. Home personal care includes cooking meals, shopping, helping around the house and helping the patient get out of bed and move around the apartment. Tr. at 286.

#### 5. Laboratory Program Director

The laboratory program director's testimony regarding the individual's importance to the Program is summarized in Section II. He also testified that he talked to the individual about the FBI investigation prior to the indictment. He told the individual to discuss the matter with the security people. Tr. at 108, 112, 114. He testified that before the indictment was issued he did not think the individual was the target of the investigation. Tr. at 116. He testified that he now understands the basis for the indictment is that the individual "had signed some time cards for providing care for people and he in fact was not personally in all cases the caregiver." Tr. at 118.

### IV. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to his eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

#### A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding

places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting her eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

#### B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

### V. ANALYSIS

There are two factual bases for the Criteria F and L security concerns. The first basis is that the individual received funds from the Medicaid program to which he was not entitled. The second basis is the individual omitted significant information in completing his 1999 QNSP and his Medicaid time reports. Both actions raise a concern about the individual's reliability, honesty and trustworthiness.

#### 1. Improperly Receiving Medicaid Funds.

The individual's first argument is that the DOE security concern should be limited to facts described in the plea agreement. I do not accept that argument. When an investigation is dropped or a plea agreement reached, the DOE makes its own judgment as to whether the behavior as charged in and of itself constitutes a security concern. The indictment squarely raises the concern that there was

improper behavior beyond the one time sheet described in the plea agreement. Therefore, notwithstanding the plea agreement, the burden is on the individual to mitigate the security concerns relating to the possibility that he improperly received funds from Medicaid. 10 C.F.R. § 710.21(b)(6).

However, the individual presented information that convinces me that Medicaid only paid for services which were actually provided, and the individual's violations related to record keeping requirements and were not an attempt to obtain funds without providing services. The individual testified that he and his wife provided the care services to his parents. The testimony of his mother supports the individual's testimony. She testified that the individual and his wife provided regular home care. The statements of the wife to the pre-sentence investigator corroborate that significant services were provided. Individual exhibit #1 at 22. The testimony of the patient representative convinced me that the parents were eligible for home care services under Medicaid and that it was appropriate for the individual to be paid for providing those services. I believe that the \$23,000 that was billed to Medicaid for the services provided to his parents was a reasonable level of compensation for the services actually provided. Therefore, I find that the individual received funds from Medicaid for services that were provided and for which Medicaid would, if properly billed, have paid. As discussed below I have some reservations about the individual's assertion that care was provided on every single one of the 425 days and for exactly the stated hours. I believe the care he exercised in filling out the forms was less than scrupulous. However, I believe that care was provided substantially as stated and Medicaid received the services for which it paid. Therefore, I find that the individual did not defraud Medicaid of any funds.

## 2. Failure to Accurately Report

The failure to accurately report information on government forms is a security concern under Criteria F and L because it suggests the individual may not be honest and reliable. The individual did not provide accurate information on the 1999 QNSP and the Medicaid forms. I also find that the individual did not testify candidly about these failures at the hearing. Therefore, for the reason stated below I do not believe he has mitigated the security concern related to his honesty and reliability.

### a. QNSP

With respect to his failure to report his part time employment on his 1999 QNSP, the individual testified that he was "probably" told not to report information on part time employment. When questioned about the matter he was evasive and seemed unable to admit that it was his responsibility to accurately complete the QNSP. He did not explain the reason for not providing the information, nor did he accept responsibility for his failure. When asked why he included his part time employment at the DOE site on the QNSP when he included no other part time employment, he testified that he always believed his employment at the DOE site was full time. I believe that he understands the inconsistency in his testimony but is unable to be open and candid in his explanation of his significant omission. Therefore, I find that he has not mitigated the security concern relating to his failures to accurately complete his 1999 QNSP.

## b. Medicaid Forms

The individual admits that his Medicaid reporting forms were not accurate. In order to convince me that the inaccurate time reports do not raise a security concern, the individual has provided an explanation. The essential elements of that explanation are (i) during 1996/97 he did not believe that incorrectly completing the time sheets was a violation of law, (ii) the home personal care services were provided on each of the 425 days,<sup>6</sup> and (iii) he did not know he was a target of the investigation of the care company.

The individual testified that he did not know that he was violating Medicaid record keeping rules. However, he did not provide any support for his statements. I do not believe the individual's testimony that he did not believe that signing the time sheets for days that he was out of town was a violation of Medicaid's rules. Tr. at 170. I am not persuaded that he did not understand the certifications on the time sheets which indicated that the individual attested to the truthfulness of his statements. I believe the individual's ability to read and understand forms is excellent. For example, during the hearing the individual testified that the home town acquaintance and his wife were not good friends. Tr. at 217. He was asked why he listed the home town acquaintance in response to Question 12 - "People who know you well" - on his 1999 and 2001 QNSP. DOE exhibit #1 & #10. He testified that he knew the home town acquaintance but he did not know him well. Tr. at 219. He was then shown the question on the QNSP and was asked "Well, what does it say right up here? They should be good friends?" He answered "No. It says good friends, comma, peers, comma, colleagues, college roommates, et cetera. It didn't say just good friends." Tr. at 220. The individual's ability to rapidly respond to that question and a number of others during the hearing indicates an ability to understand the subtleties of written and oral questions. I believe that he understood in 1996 and 1997 that he was not accurately certifying his Medicaid time sheets.

I do not believe that the individual was candid when he testified about providing home personal care on each of 425 consecutive days. As indicated above, I believe the services were provided regularly and substantially as stated, but I am not persuaded that they were provided for 425 consecutive days. The individual was out of town on at least 183 days and during that period his wife held a full time job and went to work every day. Tr. at 320. The individual would have no way to verify that his wife provided services on each of the days. I believe that the individual recognizes that the time sheets indicating the service were provided on each day for the specified hours were not accurate. However, instead of indicating that the time sheets were a reasonably accurate approximation of the hours worked, the individual testified repeatedly that the services were provided on every day. It was the dogged adherence to the unsupported and inherently unbelievable position that gives me concern. I find him unwilling to be honest and open on an issue that was unflattering to him.

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<sup>6</sup> The individual's attorney asserted on a number of occasions during the hearing that the presentence investigation demonstrates that the wife provided the home personal care on the 183 days the individual was out of town. The only information in the report that I can identify is in paragraph 88. Individual exhibit #1 at 22. That paragraph indicates the wife stated "the work was done and she did some of it." I believe that statement to be accurate. However, her statement is limited to saying that she and her husband provided services, not that the services were provided on each of the 425 days.

Another aspect of the individual's presentation which I did not find credible relates to his failure to provide knowledgeable witnesses. Early in the proceeding I suggested to the individual's attorney that "he consider calling additional witnesses with knowledge of the parents' medical conditions, as well as the medical and home health care provided to the parents." March 4, 2005, e-mail to the parties. The position of the individual's attorney is that "there's no one else to testify about whether he did what he says he did, other than he and his mother." Tr. at 262. However, the home town acquaintance and his wife were both named in the September 2002, indictment and would have had first hand knowledge of the business practices of the care company. They would have been logical witnesses. The individual's mother testified that she knows the home town acquaintance because he lives on the second floor of her apartment building. Tr. at 269. Therefore, the individual was clearly in a position to contact the home town acquaintance. However, at the hearing the individual testified that "I think after I stayed with them for two months our relationship got worse." Tr. at 156. He testified "We're not friends anymore, but I still appreciate very much their allowing me to stay with them for two months when I got to [the first United States city in which the individual lived]. Tr. at 257. The suggestions that their relationship got worse after he lived with them for two months and they are not currently friends do not convince me that they could not have honestly testified at the hearing. I find that the individual's testimony that the home town acquaintance would not testify honestly was a self serving attempt to suggest that corroborating testimony was unavailable. I suspect that the individual had some unexplained concerns about some of the testimony that the acquaintance might give.

Similarly, the individual's attorney suggested in the document providing the individual's witness list that the individual's wife would be unable to testify. The letter stated that the individual and his wife are estranged, she lives in a different city, and their divorce is ongoing. February 25, 2005 letter from the individual's attorney at 3. Again, this implies that the individual's wife would not be willing to testify or would not testify honestly. I believe that she could have testified by telephone and provided highly relevant information about the personal care service provided to the individual's parents.<sup>7</sup> After hearing her testimony, I would then have been in a position to judge the credibility

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<sup>7</sup> The individual's attorney submitted a post hearing letter which included two attachments. In the letter the attorney indicated he contacted the individual's wife to obtain some additional support for the individual's testimony. His letter indicates without explanation that he was "rebuffed." He provides as evidence of a strained relationship between the individual and his wife one page of a family court order requiring the individual to provide support for his children and his wife. Neither the one page of the court order or the individual statement in his letter indicating he was rebuffed by the wife convince me that she could not have testified candidly at the hearing.

of testimony she provided and would have been able to more accurately determine the services provided to the individual's parents. Therefore, I do not accept the individual's attorney's argument that there were no other witnesses that could have provided information about the care company and the services provided to the individual's parents. I find the individual has failed to provide knowledgeable witnesses to support his testimony on the issue of the provision of home care.

Another example of the testimony which I believe was not candid concerned the individual's assertions regarding his belief that there was no investigation of the care company in 2001. He was asked if the investigation was ongoing in January 2001. He testified that "First of all, I didn't know anything about the investigation. I'm not sure if there was any investigation. Because in 2001, I went through the background check by the FBI in [city in which he lived] and FBI couldn't find anything. . . . So I doubt that there was any investigation at that time." Tr. at 174. However, on his 1999 QNSP he had not listed that he was an employee of the care company. Therefore, the FBI would have been unlikely to look for an investigation of that firm. He did list the care firm employment on his November 2001 QNSP. However, in the 2001 QNSP the individual spelled the care company's name significantly differently from the correct spelling.<sup>8</sup> Accordingly, it would have been difficult for the FBI to associate the individual with the care company in a follow up investigation of the care company. I believe the individual's testimony at the hearing was an attempt to minimize the importance of the investigation. I am concerned that the individual was trying to reduce the possibility the DOE would look into the details of the care company investigation.

In analyzing the individual's testimony I bear in mind the standard in access authorization hearings which is that it is the burden on the individual to bring forward information to resolve the security concern. The individual has failed to present witnesses that convince me that his description of events is accurate. Furthermore, I believe that the individual's testimony that explained those activities was less than candid. Therefore, the individual has failure to persuade me that i) services were provided on each of the 425 days, ii) he genuinely believed that his time reports were not a violation of law, iii) he believed he was not a target of the care company investigation, and iv) his failure to list the care company on his 1999 QNSP was an oversight. Therefore, I find the DOE security concerns regarding the individual's reliability and honesty have not been mitigated.

## VI. CONCLUSION

The individual's consistent approach is to shade the facts in his own favor to reach a desired result. Using a rough approximation may be acceptable in ordinary daily circumstances. However, individuals holding an access authorization are held to a higher standard. The individual has not, in this proceeding, demonstrated the level of concern for scrupulous honesty required to hold an access authorization.

Therefore, I have concluded that the individual has not mitigated the DOE security concerns under Criteria F and L. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly

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<sup>8</sup> I believe the correct spelling was used in the indictment, the individual's October 23, 2002 memorandum and his attorney's pleadings.

consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wiekert  
Hearing Officer  
Office of Hearings and Appeals

Date: May 26, 2005